UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

RICHARD A. FROST,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 03-215-P-H***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") appeal raises the issue whether substantial evidence supports the commissioner's determination that the plaintiff, who alleges that he suffers from neck and back problems, chronic fatigue, sleep problems and depression, is capable of making an adjustment to work existing in significant numbers in the national economy. I recommend that the decision of the commissioner be affirmed.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 404.1520; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative

[1] This action is properly brought under 42 U.S.C. § 405(g). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decis ion and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on April 28 and May 4, 2004, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

law judge found, in relevant part, that the medical evidence established that the plaintiff had a vertebrogenic disorder of the cervical spine – an impairment that was "severe" but did not meet or equal any listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 3, Record at 30; that his statements concerning his impairments and their impact on his ability to work were not entirely credible in light of his own descriptions of his activities and lifestyle, the degree of medical treatment required and discrepancies between his assertions and information contained in the documentary reports, the reports of treating and examining practitioners and the medical history, Finding 4, *id*. at 31; that he lacked the residual functional capacity ("RFC") to lift and carry more than twenty pounds or more than ten pounds on a regular basis but had no significant non-exertional limitations narrowing the range of work he was capable of performing, Findings 5 & 7, *id*.; that considering his age (51, an individual "closely approaching advanced age"), education (high school), work experience (unskilled) and exertional capacity for light work, Rule 202.13 of Table 2, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid"), directed a finding of "not disabled," Findings 8-11, *id*.; and he therefore was not under a disability at any time through the date of decision, Finding 12, *id*.[2] The Appeals Council declined to review the decision, *id*. at 7-10, making it the final determination of the commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn.

[2] The decision in this case was rendered on October 28, 1999, *see* Record at 32, approximately two months prior to the *(continued on next page)*

Richardson v. Perales, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. § 404.1520(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's RFC to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

In his statement of errors, the plaintiff complained that the administrative law judge (i) arrived at an RFC that is unsupported by substantial evidence, (ii) failed to give appropriate weight to the opinions of treating physicians Lucius T. Hill, M.D., Gary Kish, M.D., William S. Sutherland, M.D., and Bruce R. Myers, M.D., (iii) failed to fully develop the record, (iv) neglected to take into account the plaintiff's ongoing eligibility for workers' compensation benefits and (v) made a flawed analysis of the plaintiff's subjective complaints of pain. *See generally* Plaintiff's Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 10).

In addition, at oral argument on April 28, 2004, counsel for the plaintiff asserted for the first time that per *Nieves v. Barnhart*, No. 03-144-P-S, 2004 WL 390948 (D. Me. Mar. 3, 2004) (rec. dec., *aff'd* Mar. 25, 2004) – issued subsequent to the filing of the Statement of Errors – the administrative law judge was collaterally estopped from determining the plaintiff's RFC to be greater than found previously by a different administrative law judge, Thomas A. Powell. In the interest of fairness to the commissioner and full

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expiration of the period for which the plaintiff remained insured for purposes of SSD, *see* Finding 1, *id*. at 30.

exposition of the point, I directed that supplemental oral argument limited to the collateral-estoppel issue be held on May 4, 2004. With the benefit of both arguments, I now conclude that there is no reversible error.

I. Discussion

A. Collateral Estoppel

On the basis of a diagnosis of melanoma, the plaintiff was found qualified for SSD benefits effective September 15, 1986. *See* Record at 16, 67. Effective February 1994 he was found no longer disabled as a result of "sustained clinical remission" coupled with lack of "evidence of any severe medical condition currently." *Id*. at 72. He appealed, requesting a hearing before an administrative law judge. *See id*. at 89. A hearing was held before Judge Powell on July 26, 1995, following which, by decision dated October 24, 1995, Judge Powell determined that the plaintiff's disability had ceased in February 1994 as a result of medical improvement in his condition and an RFC for light work. *See id*. at 218, 223-24. Specifically, Judge Powell found that the plaintiff retained the RFC, *inter alia*, "for work which requires a less than light level of exertion" inasmuch as he was "restricted to stooping and crawling on an occasional basis and . . . unable to perform overhead work." Finding 4, *id*. at 223. In the body of his decision, Judge Powell observed that were the plaintiff capable of the full range of light work, strict application of the Grid would direct a finding of not disabled; however, such strict application was "not possible, since the claimant has non-exertional limitations which narrow the range of work he is capable of performing." *Id*. at 222.

The plaintiff filed the benefits application in issue on September 2, 1998, alleging an inability to work since May 31, 1994. *See id*. at 16. In due course, a hearing was held before a new administrative law judge, James E. Cradock. *See id*. at 16, 32. By decision dated October 28, 1999 Judge Cradock found the plaintiff capable of light work, with "no significant non-exertional limitations which narrow the range of

work he is capable of performing." Findings 7 & 11, *id*. at 31; *see also id*. at 29. Judge Cradock then applied the Grid to find the plaintiff not disabled. *See* Findings 8-12, *id*.

In *Nieves*, this court quoted the holding of the Court of Appeals for the Sixth Circuit in *Drummond v. Commissioner of Soc. Sec*., 126 F.3d 837 (6th Cir. 1997), that, with respect to a claimant's RFC, "[a]bsent evidence of an improvement in a claimant's condition, a subsequent ALJ is bound by the findings of a previous ALJ." *Nieves*, 2004 WL 390948, at *2 (quoting *Drummond*, 126 F.3d at 842). Nonetheless, as counsel for the commissioner pointed out at supplemental oral argument, *Nieves* is distinguishable. *Nieves* concerned whether an individual whose benefits were suspended on the basis of so-called "fleeing felon" status could be forced to reapply for benefits when that status ended and, if so, whether the new application could be denied without evidence of medical improvement. *See id*. I cited *Drummond* for the proposition that "[t]he fundamental unfairness inherent in the commissioner's treatment of the plaintiff in this case is obvious; whether it infringes the doctrine of estoppel or that of *res judicata* may be a point for fine legal debate, but does not change the outcome." *See id*.

Thus, *Nieves* does not compel the conclusion that in this case Judge Cradock was collaterally estopped from reexamining the question of RFC. Nor am I otherwise inclined to apply *Drummond* to reach that result. As counsel for the commissioner noted, *Drummond* represents a departure from the commissioner's established policy that when a claimant files a new application covering a new time frame, the issues (including RFC) are to be examined *de novo*. *See, e.g., Albright v. Commissioner of Soc. Sec. Admin*., 174 F.3d 473, 476 (4th Cir. 1999) ("The SSA treats a claimant's second or successive application for disability benefits as a claim apart from those earlier filed, at least to the extent that the most recent application alleges a previously unadjudicated period of disability."); Acquiescence Ruling 98-4(6),

reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2003), at 356 (noting difference between commissioner's policy and *Drummond*).

Drummond, in turn, relied heavily on *Lively v. Secretary of Health & Human Servs.*, 820 F.2d 1391 (4th Cir. 1987), in which the Court of Appeals for the Fourth Circuit vacated the denial of a claimant's second application for benefits, observing:

> The first ALJ found, in 1981, that plaintiff was limited to light work, and the Secretary successfully defended that finding on judicial review. Some two weeks after appellant was found limited to light work, he became 55 years of age. It is utterly inconceivable that his condition had so improved in two weeks as to enable him to perform medium work. Principles of finality and fundamental fairness drawn from § 405(h) [*res judicata* principles] . . . indicate that the Secretary must shoulder the burden of demonstrating that the claimant's condition had improved sufficiently to indicate that the claimant was capable of performing medium work. Certainly, there was no evidence of any such miraculous improvement[.]

Lively, 820 F.2d at 1392 (citation and footnote omitted).

Importantly, after issuance of *Drummond*, the Fourth Circuit clarified its holding in *Lively* in critical respects, observing that *Lively* should not be understood as a rejection of the commissioner's established policy. *See Albright*, 174 F.3d at 476-77 ("The SSA's treatment of later-filed applications as separate claims is eminently logical and sensible, reflecting the reality that the mere passage of time often has a deleterious effect on a claimant's physical or mental condition. . . . Although we might state with some assurance that a claimant's condition very likely remains unchanged within a discrete two-week period, we would grow ever less confident as the timeframe expands. Where, as here, the relevant period exceeds three years, our swagger becomes barely discernible.") (footnote omitted). The court summed up: "Rather than signaling a sea change in the law of preclusion, the result in *Lively* is instead best understood as a practical illustration of the substantial evidence rule." *Id*. at 477 (footnote omitted).

I find the Fourth Circuit's reasoning in *Albright* persuasive. In this case, in which (i) there was a gap of three years between Judge Powell's previous adjudication and the plaintiff's filing of the current application for benefits, (ii) the plaintiff was approximately three years away from the next higher age category (age 47) at the time of Judge Powell's decision, *see, e.g.*, Finding 6, Record at 223, (iii) Judge Cradock's decision concerned a different time period than Judge Powell's, and (iv) Judge Cradock based his decision not only on previous evidence presented to Judge Powell but also on significant new evidence, application of the doctrine of collateral estoppel simply is inappropriate.

I therefore turn to the question whether, within the four corners of the record presented to Judge Cradock, the decision was supported by substantial evidence.

B. RFC Assessment

The record in this case contains sharply conflicting RFC assessments, running the gamut from a finding of disabling restrictions to an absence of any discernable limitation. *Compare, e.g.*, Record at 344 (opinion of plaintiff's examining physician, Frank A. Graf, M.D., that plaintiff "is severely limited" in capacities for bending, stooping, lifting, carrying, pushing, pulling, reaching, sitting and standing and "is considered to be disabled for all employment since May of 1994") *with id*. at 321 (finding by Disability Determination Services ("DDS") examining physician Stephen Doane, M.D., of "no impairment in usual working activities of sitting, standing, walking, lifting, carrying, bending, handling objects, hearing, speaking, or traveling."). Faced with a record such as this, an administrative law judge is obliged to make a choice. As a rule, once that choice has been made, a court must resist the temptation to reweigh the evidence and substitute its own view. *See, e.g.*, *Rodriguez*, 647 F.2d at 222 ("The Secretary may (and, under his regulations, must) take medical evidence. But the resolution of conflicts in the evidence and the determination of the ultimate question of disability is for him, not for the doctors or for the courts.").

Not surprisingly, under these circumstances, the plaintiff attacks the substantiality of the evidence supporting the choice made, arguing, *inter alia*, that (i) the administrative law judge's reliance on Dr. Doane's report was misplaced inasmuch as the Doane report "lacks any RFC findings regarding [the plaintiff's] ability to sustain [work-related] activities over time under the stress of an eight hour per day, five day per week schedule" and ignores the plaintiff's alleged pain symptoms, and (ii) "the ALJ apparently attempted to substitute his negative finding regarding the claimant's credibility for positive medical evidence to meet the Commissioner's step five burden." Statement of Errors at 11. I am unpersuaded.

The Doane report reasonably can be construed as assessing the plaintiff's capacity to work five days a week, eight hours per day, with Dr. Doane finding no impairment "in usual working activities[.]" Record at 321. Further, inasmuch as appears, Dr. Doane's examination was calculated to detect the presence of disabling pain on exertion, with Dr. Doane quizzing the plaintiff as to the nature of his complaints and the manner in which he spent his days and conducting range-of-motion examinations. *See id*. at 319-21. Per the Doane report, the plaintiff informed Dr. Doane that (i) his problem was continued worry that metastatic melanoma, then in remission, would recur, and (ii) he spent typical days cooking, gardening and reading. *See id*. at 319-20. On examination, Dr. Doane found him to be "a very well developed, well muscled middle-age male who ha[d] the physique of a body builder," with "[r]ange of motion reveal[ing] excellent flexibility throughout." *Id*. at 320. In short, Dr. Doane detected neither disabling pain nor any other restriction that would impede the plaintiff in completing a normal workweek.[3]

What is more, the administrative law judge relied in part on the reports of two non-examining DDS physicians who (with the benefit, *inter alia*, of the Doane report) assessed the plaintiff as having an RFC

[3] Dr. Doane did state, "It would remain to be seen whether he would have some fatigue in a job that would require *(continued on next page)*

consistent with the demands of light (if not heavier) work. *See id*. at 29. Relevant regulations define light work as entailing

> lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may by very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing light work, you must have the ability to do substantially all of these activities.

20 C.F.R. § 404.1567(b). DDS non-examining physicians Gary Weaver, M.D., and Lawrence P. Johnson, M.D., assessed the plaintiff as retaining, *inter alia*, the capacity to lift fifty pounds occasionally and twenty-five pounds frequently, stand or walk for about six hours in an eight-hour workday, sit for about six hours in an eight-hour workday and engage in unlimited pushing or pulling of hand or foot controls. *See id*. at 325 (Weaver RFC assessment dated March 9, 1999), 333 (Johnson RFC assessment dated December 16, 1998).

In short, the Record contains substantial positive evidence in support of the RFC finding of the administrative law judge in the form of the report of DDS examining physician Dr. Doane combined with the RFC assessments of DDS non-examining physicians Drs. Weaver and Johnson. The plaintiff's arguments notwithstanding, the administrative law judge did not impermissibly substitute a negative credibility finding for the requisite positive evidence in support of his RFC finding.[4]

C. Treatment of Treating Physicians

extremely heavy exertion throughout an eight-hour day." *Id*. at 321. However, the administrative law judge factored this in when he found the plaintiff limited to light work.

[4] Further, the Record supports the administrative law judge's determination that the plaintiff's mental impairments did not significantly narrow the range of light work he could perform. *See* Record at 20. Inasmuch as appears from the Record, the plaintiff did not seek mental-health treatment. In August 1995 DDS examining consultant John L. Newcomb, M.D., diagnosed him with depressive disorder, not otherwise specified, with mild resultant impairment. *See id*. at 208-09.

The plaintiff next complains that the administrative law judge committed reversible error in failing to properly evaluate and weigh treating-physician opinions. *See* Statement of Errors at 12. Again, I disagree. The weight to which a treating physician's opinion is entitled depends in part on the subject matter addressed. Determinations regarding RFC and disability are reserved to the commissioner; accordingly, no "special significance" is accorded an opinion even from a treating source as to these matters. *See* 20 C.F.R. §§ 404.1527(e)(1)-(3). Nonetheless, such an opinion is entitled to consideration based on six enumerated factors: (i) length of the treatment relationship and frequency of examination, (ii) nature and extent of the treatment relationship, (iii) supportability – *i.e.*, adequacy of explanation for the opinion, (iv) consistency with the record as a whole, (v) whether the treating physician is offering an opinion on a medical issue related to his or her specialty, and (vi) other factors highlighted by the claimant or others. *Id*. §§ 404.1527(d)(2)-(6); Social Security Ruling 96-5p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2003) ("SSR 96-5p"), at 124 ("In evaluating the opinions of medical sources on issues reserved to the Commissioner, the adjudicator must apply the applicable factors in 20 CFR 404.1527(d) and 416.927(d)."). Regardless of the subject matter as to which a treating physician's opinion is offered, the commissioner must "always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion." 20 C.F.R. § 404.1527(d)(2).

The plaintiff cites *Newton v. Apfel*, 209 F.3d 448, 453 (5th Cir. 2000), for the proposition that "absent reliable medical evidence from a treating or examining physician controverting the claimant's treating specialist, an ALJ may reject the opinion of the treating physician only if the ALJ performs a detailed analysis of the treating physician's views under the criteria set forth in 20 C.F.R. § 404.1527(d)(2)." *See* Statement of Errors at 14. The plaintiff does not cite, nor do I find, First Circuit caselaw indicating that there are circumstances under which an administrative law judge must slavishly discuss each of the section

404.1527(d)(2) criteria.[5] In any event, even assuming *arguendo* that the First Circuit were to follow the lead of the *Newton* court, this case would not qualify as one in which such discussion is required. As noted above, the Record contains reliable medical evidence from an examining physician finding the plaintiff free from restriction save possible fatigue were he to undertake work requiring heavy exertion.

That said, I find no error in the administrative law judge's handling of the opinions of Drs. Hill, Kish, Sutherland and Myers. In each case, he did what he was obliged to do: *i.e.*, take them into consideration and articulate good reasons for the weight accorded to each. To the extent he omitted to discuss any particular opinion, I find the error to have been harmless.[6]

Dr. Hill: The Record reveals that for a period of approximately ten years (from at least November 1986 until July 1996) Dr. Hill treated and followed the plaintiff for a malignant metastatic melanoma of a type that is almost uniformly fatal but from which the plaintiff made an extraordinary recovery, with the disease going into remission in approximately 1988. *See, e.g.*, Record at 148-49, 174-175, 293.[7]

The Record contains a letter dated March 7, 1994 in which Dr. Hill stated that although the plaintiff had been without evidence of melanoma since 1988, "[h]e has, however, had ongoing symptoms of easy fatiguability and central chest pain when deep breathing or lifting." *Id.* at 174. Dr. Hill went on:

> He feels that these symptoms limit his ability to work and that he is fearful of any situation which will lead to severe fatigue because he is concerned that this might lead to recurrence of his disease.

[5] Tellingly, while not directly addressing this issue, the First Circuit has upheld rejection of treating-physician opinions on the basis of consideration of select section 404.1527(d) factors. *See, e.g., Morales v. Commissioner of Soc. Sec.*, 2 Fed. Appx. 34, 36 (1st Cir. 2001) (administrative law judge supportably rejected treating-physician RFC assessments on basis they were not corroborated by clinical studies or findings and were refuted by rest of record evidence); *Keating v. Secretary of Health & Human Servs.*, 848 F.2d 271, 276 (1st Cir. 1988) ("A treating physician's conclusions regarding total disability may be rejected by the Secretary especially when, as here, contradictory medical advisor evidence appears in the record.").

[6] The plaintiff acknowledges that Dr. Graf, who examined him once for purposes of this case, *see* Record at 342-44, does not qualify as a "treating physician," *see* Statement of Errors at 9.

[7] Dr. Hill retired in March 1997. *See* Record at 293.

> I tend to believe these concerns and feel that he is not completely rehabilitated. I think that he needs job retraining or the like prior to discontinuance of his disability checks.

Id. In addition, Dr. Hill's progress notes contain his arguable "opinion" that, following the plaintiff's complete remission, he had "been disabled from chest pain and shortness of breath. It has not improved over the past year and he says it makes him really get quite winded at the end of two flights of stairs. He also has pain on every breath which he describes as being deep inside the center of his chest." *Id*. at 177 (progress note of November 24, 1993). However, in the same note, Dr. Hill remarked: "It would be interesting to get some pulmonary function studies to see if this shortness of breath is of pulmonary origin or whether there is any objective evidence for it. Cardiogram might be useful as well as a CT scan of the chest." *Id*.

The administrative law judge gave due consideration to the opinions of Dr. Hill, supportably finding, *inter alia*, that (i) Dr. Hill implied that the plaintiff physically was able to work, *see id*. at 19, and (ii) to the extent that Dr. Hill opined that the fatigue and shortness-of-breath symptoms restricted the plaintiff's work capacity, the etiology of those conditions has not been established, *see id*. at 19, 25, 177, 341.

Dr. Kish: The plaintiff testified that he injured his neck when he "wedged" it while welding in a tight spot at the Portsmouth Naval Shipyard in 1978, that over time his neck problems had gotten considerably more severe and that, through the date of hearing, he continued to receive workers' compensation benefits stemming from that injury. *See id*. at 45-46. Inasmuch as appears from the one page of Dr. Kish's progress notes that are of record, Dr. Kish assessed the plaintiff's neck condition annually from at least May 1991 through April 1994. *See id*. at 173. Dr. Kish subsequently retired from clinical practice, whereupon Dr. Sutherland took over care of the plaintiff's neck. *See id*. at 357.

In his progress note of April 17, 1994 Dr. Kish stated, in relevant part: "Any type of activity other than sedentary bothers him, particularly overhead work, reaching, pulling and working in cramped spaces. His exam remains essentially as was determined last year. He remains totally disabled as a result of this." *Id*. at 173. Again, the administrative law judge gave due consideration to this opinion, according it little weight for several compelling reasons, including that (i) the opinion of total disability was not supported by Dr. Kish's own examinations, which revealed no abnormality other than a reduced range of neck motion, (ii) Dr. Kish inconsistently indicated that the plaintiff was capable of sedentary work, and (iii) Dr. Kish's statement concerning limitations on overhead work appeared to be based on the plaintiff's subjective complaints rather than objective observation. *See id*. at 19-20, 29, 173.[8]

Dr. Sutherland: The Record contains four progress notes of Dr. Sutherland assessing the plaintiff's neck condition from March 17, 1997 through March 24, 1999 as well as a letter dated February 9, 2000 opining on the disabling nature of that condition. *See id*. at 356-62. Critically, Dr. Sutherland's opinion letter postdated the administrative law judge's October 28, 1999 decision. *Ipso facto*, the administrative law judge cannot be said to have erred in giving it short shrift. *See, e.g., Mills v. Apfel*, 244 F.3d 1, 4 (1st Cir. 2001) ("To weigh the new evidence as *if* it were before the ALJ would be, as one court fairly observed, a very peculiar enterprise, and (to us) one that distorts analysis. The ALJ can hardly be expected to evaluate or account for the evidence that he never saw.") (citation and internal quotation marks omitted) (emphasis in original). Nor does the plaintiff argue that (i) the evidence is material and there is good cause for its tardiness, or (ii) the Appeals Council was egregiously mistaken in its bases for denying review despite

[8] The plaintiff contends that the administrative law judge "acknowledged that the greatest level of work capacity possibly consistent with the reports from the long time treating physician, Dr. Kish, was sedentary work." Statement of Errors at 10. The administrative law judge did not express any agreement with this limitation; rather, he highlighted it for purposes of underscoring its inconsistency with Dr. Kish's further opinion that the plaintiff was totally disabled. *See* Record at 19-

(continued on next page)

the proffer of that new evidence. *See generally* Statement of Errors. Hence, that evidence is not cognizable for purposes of this appeal. *See, e.g., Mills*, 244 F.3d at 5-6.[9]

Dr. Sutherland's progress notes, which were made available to the administrative law judge, do not contain opinions as to the plaintiff's RFC or disability. *See* Record at 356-60. They do record Dr. Sutherland's impression on examination of reduced neck mobility, chronic neck pain and clinical evidence of "some mild disc bulging at the 3-4, 4-5 and 5-6 levels" as well as "some mild right foraminal stenosis at the 3-4 level, due to some osteophyte formation." *Id*. at 356-57. These findings were duly considered by the administrative law judge, who credited that the plaintiff suffered from an objectively verifiable neck condition, *see id*. at 20 & Finding 3 at 30, but (as discussed below) made supportable findings concerning his degree of pain and functional limitation. Dr. Myers: The Record reveals that Dr. Myers, a physiatrist, saw the plaintiff on referral from Dr. Sutherland on two occasions in 1998. *See id*. at 345-50. Counsel for the commissioner posited at oral argument that such a relationship is too scanty to qualify a doctor as a "treating physician" and, in any event, lessens the weight to which the doctor's opinion is entitled. Even assuming *arguendo* that Dr. Myers was a treating physician, I find no reversible error in the handling of this evidence. On the two occasions on which Dr. Myers saw the plaintiff, he completed a New Hampshire Workers' Compensation Medical Form. *See id*. at 345-50. Under the heading "Employee Work Capability," the form poses the basic question whether a workers' compensation recipient can either continue working or return to work. *See id*. If a recipient can do either of those things, the form then queries whether he or she is able to work full duty or with modifications, which are to be listed. *See id*. On

20.

[9] At oral argument, counsel for the plaintiff suggested that pursuant to *Mills*, a claimant need only show that the Appeals Council expressly considered late evidence and determined that it did not change the underlying findings. This is too generous a reading of *Mills*, which held that "an Appeals Council refusal to review the ALJ may be reviewable where it *(continued on next page)*

both occasions, Dr. Myers checked a box indicating, without explication, that the plaintiff could not return to work. *See id*.

In addition to filling in the plaintiff's workers' compensation forms, Dr. Myers touched on the subject of the plaintiff's functional capacity in a progress note dated August 19, 1998 in which he noted under the heading "Social History": "Functionally, [the plaintiff] does light jobs around the home and light activities but nothing heavy." *Id*. at 348. He recommended that the plaintiff "continue avoiding overhead activities and static neck postures especially in extension." *Id*. at 349. The Record also contains an opinion letter from Dr. Myers dated November 15, 1999, *see id*. at 363; however, this letter, like that of Dr. Sutherland, postdated the administrative law judge's decision, and the plaintiff articulates no persuasive reason why it should be cognizable on this appeal.

The administrative law judge omits any mention of Dr. Myers' opinion as expressed on the workers' compensation forms. *See* Record at 16-32. Nonetheless, even assuming *arguendo* that this was error, I consider it harmless. From all that appears, the workers' compensation form queries whether the plaintiff is capable of returning to work at the Portsmouth Naval Shipyard – not whether he is capable of returning to any sort of work. *See* Record at 346, 350. In any event, as discussed below, the test of eligibility for New Hampshire workers' compensation benefits differs significantly enough from that for eligibility for Social Security disability benefits that a physician's opinion given for workers' compensation purposes properly could be given little to no weight. *See, e.g., Robinson v. Apfel*, No. 97 Civ. 5495(DC), 1998 WL 329273, at *4 n.1 (S.D.N.Y. June 22, 1998) ("[T]he ALJ properly refused to give controlling

gives an egregiously mistaken ground for this action." *Mills*, 244 F.3d at 5.

weight to Dr. Tambakis's opinion that plaintiff was disabled, for that opinion was given in the context of plaintiff's worker's compensation claim, which involved a wholly different statutory test.").

The administrative law judge duly considered Dr. Myers' further opinion that the plaintiff had difficulty with overhead work, supportably rejecting it on the basis, *inter alia*, of its inconsistency with Dr. Doane's findings on examination. *See id*. at 29.

Accordingly, there is no reversible error in the administrative law judge's treatment of the cognizable opinions of Drs. Hill, Kish, Sutherland and Myers.[10]

D. Development of Record

The plaintiff next complains that the administrative law judge failed to develop the record adequately, neglecting to seek necessary clarification from his treating physicians pursuant to 20 C.F.R. § 404.1512(e) and Social Security Rulings 96-2p and 96-5p. *See* Statement of Errors at 15-16. He observes that "[w]hile direct statements of disability by the physicians are 'on issues reserved to the Commissioner' and thus not specifically binding, the ALJ may not ignore such opinions," contending that inasmuch as the administrative law judge "obviously did not understand why the treating physicians all concluded that [he] was totally disabled[,]" he was required to recontact them for clarification. *Id*. at 16.

Section 404.1512 provides, in relevant part:

> (e) *Recontacting medical sources*. When the evidence we receive from your treating physician or psychologist or other medical source is inadequate for us to determine whether you are disabled, we will need additional information to reach a determination or a decision. To obtain the information, we will take the following actions.
>
> (1) We will first recontact your treating physician or psychologist or other medical source to determine whether the additional information we need is readily available. We

[10] The Record reveals that the plaintiff also saw James H. Gilroy, M.D., on July 26, 1999. *See* Record at 340-41. Counsel for the plaintiff acknowledged at oral argument that Dr. Gilroy does not qualify as a treating physician. In any event, Dr. Gilroy offered no opinion on the subjects of RFC or disability. *See* Record at 340-41.

> will seek additional evidence or clarification from your medical source when the report from your medical source contains a conflict or ambiguity that must be resolved, the report does not contain all the necessary information, or does not appear to be based on medically acceptable clinical and laboratory diagnostic techniques. We may do this by requesting copies of your medical source's records, a new report, or a more detailed report from your medical source, including your treating source, or by telephoning your medical source. In every instance where medical evidence is obtained over the telephone, the telephone report will be sent to the source for review, signature and return.
>
> (2) We may not seek additional evidence or clarification from a medical source when we know from past experience that the source either cannot or will not provide the necessary findings.
>
> (f) *Need for consultative examination*. If the information we need is not readily available from the records of your medical treatment source, or we are unable to seek clarification from your medical source, we will ask you to attend one or more consultative examinations at our expense. . . . . Generally, we will not request a consultative examination until we have made every reasonable effort to obtain evidence from your own medical sources. However, in some instances, such as when a source is known to be unable to provide certain tests or procedures or is known to be nonproductive or uncooperative, we may order a consultative examination while awaiting receipt of medical source evidence. We will not evaluate this evidence until we have made every reasonable effort to obtain evidence from your medical sources.

20 C.F.R. §§ 404.1512(e)-(f).

Also of relevance is 20 C.F.R. § 404.1527(c)(3), which provides in its entirety:

> If the evidence is consistent but we do not have sufficient evidence to decide whether you are disabled, or if after weighing the evidence we decide we cannot reach a conclusion about whether you are disabled, we will try to obtain additional evidence under the provisions of §§ 404.1512 and 404.1519 through 404.1519h. We will request additional existing records, recontact your treating sources or any other examining sources, ask you to undergo a consultative examination at our expense, or ask you or others for more information. We will consider any additional evidence we receive together with the evidence we already have.

Id. § 404.1527(c)(3).

SSR 96-5p in effect glosses these regulations in the context of opinions reserved to the commissioner *(e.g*., regarding disability and RFC), providing in relevant part:

> Because treating source evidence (including opinion evidence) is important, if the evidence does not support a treating source's opinion on any issue reserved to the Commissioner and the adjudicator cannot ascertain the basis of the opinion from the case record, the adjudicator must make "every reasonable effort" to recontact the source for clarification of the reasons for the opinion.

SSR 96-5p, at 127.[11]

Importantly, SSR 96-5p contemplates a need for clarification not only when the evidence does not support the treating source's opinion on an issue reserved to the commissioner but also when, in addition, the adjudicator cannot ascertain the basis of the opinion from the case record. *See id.; see also, e.g., Alejandro v. Barnhart*, 291 F. Supp.2d 497, 512 (S.D. Tex. 2003) ("SSR 96-5p does not say that ALJs must recontact a treating physician whenever the record as a whole (or a treating physician's particular contribution to the record) fails to support his opinions. To the contrary, SSR 96-5p requires recontact solely when both (a) the record fails to support a treating source's opinion, and (b) the basis of the treating source's opinion is unascertainable from the record. The ALJ does not express confusion regarding the basis of Dr. Igoa's opinion; instead, she concludes that the purported basis for his opinion does not lend any support to said opinion. This distinction is dispositive[.]") (citation omitted).

Although the plaintiff posits that the administrative law judge "obviously" did not understand the basis for any of the treating-physician opinions, I find that he betrayed such confusion with respect to the opinions of only one treating physician, Dr. Kish. *See* Record at 19-20 (noting that Dr. Kish "provided no explanation why the claimant was totally disabled if he was not bothered by sedentary activity. Further, Dr. Kish did not make any consistent diagnosis.").

[11] While the plaintiff also cites Ruling 96-2p, it pertains to treating physicians' medical opinions, *i.e.*, opinions on the nature and severity of an individual's impairments. *See* Social Security Ruling 96-2p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2003) ("SSR 96-2p"), at 112, 114. I construe the plaintiff's point of error to implicate SSR 96-5p, concerning the treatment of opinions on issues reserved to the commissioner, such as disability and *(continued on next page)*

There being no indication that the administrative law judge made any attempt to contact Dr. Kish for clarification, the question arises whether the omission was reversible error. I conclude that on the facts of this case it was not. SSR 96-5p should be construed in conjunction with 20 C.F.R. §§ 404.1512(e)-(f) and 404.1527(c)(3), which address the need to recontact a treating physician and are among the regulations cited as authority for that particular ruling. *See* SSR 96-5p, at 122. As a threshold matter, these regulations impose a duty to recontact a treating physician only when the record is inadequate to make a determination of disability. *See* 20 C.F.R. §§ 404.1512(e), 404.1527(c)(3); *see also, e.g., Gallegos v. Barnhart*, 80 Fed. Appx. 10, 12 (9th Cir. 2003) ("[T]he ALJ did not have an obligation to seek clarification from Dr. Ho regarding possible inconsistencies in his report because there was sufficient evidence in the record to make a determination regarding disability."); *White v. Massanari*, 271 F.3d 1256, 1261 (10th Cir. 2001) ("It is the inadequacy of the record, rather than the rejection of the treating physician's opinion, that triggers the duty to recontact that physician. We believe there was an adequate record by which the ALJ could decide this difficult case. He had before him not only Dr. Fanning's records but also the records of Ms. White's prior physician, as well as those of the consulting physicians.") (citation omitted).

What is more, even when a duty to seek clarification arises, sections 404.1512(e)-(f) and 404.1527(c)(3) contemplate that it may be satisfied not only (preferably) by recontacting the treating physician but also (alternatively) by obtaining a consultative examination at the commissioner's expense. *See* 20 C.F.R. §§ 404.1512(e)-(f), 404.1527(c)(3); *see also, e.g., Knox v. Barnhart*, 60 Fed. Appx. 374, 377 (3d Cir. 2003) ("The regulations provide that if the Commissioner finds the evidence provided by the claimant to be inadequate in determining whether the claimant is disabled, the Commissioner can take a

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RFC. *See* Statement of Errors at 15-16.

variety of steps to augment the medical evidence, including affirmatively seeking clarification from the treating physician, and/or calling another expert.") (citations omitted).[12]

Inasmuch as, in this case, (i) the plaintiff submitted evidence from multiple treating physicians as well as an examining physician, Dr. Graf, (ii) Dr. Kish had retired, (iii) the plaintiff was examined at the commissioner's expense by Dr. Doane, and (iv) the administrative law judge's findings regarding RFC were supported by substantial evidence, I find that the record was adequately developed to permit a reasoned decision regarding disability. Thus, no reversible error was committed in the failure to recontact Dr. Kish for clarification of ambiguous or seemingly baseless disability opinions.

E. Workers' Compensation Finding

In his fourth point of error, the plaintiff asserts that the administrative law judge erred in ignoring his evidence that he had been deemed eligible for, and continued to receive, workers' compensation benefits stemming from a neck injury suffered at Portsmouth Naval Shipyard in 1978. *See* Statement of Errors at 17; Record at 45-46. He posits that it was reversible error not to have at least considered that evidence, relying on a line of cases finding Veterans' Administration disability determinations entitled to varying amounts of weight in the context of Social Security disability adjudications. *See* Statement of Errors at 17; *see also, e.g., McCartey v. Massanari*, 298 F.3d 1072, 1075 (9th Cir. 2002) ("The issue of the evidentiary significance of a VA disability rating is a matter of first impression in this circuit. However, the nine circuits that have considered this issue agree that a VA disability rating is entitled to evidentiary weight

[12] I take comfort that, in an opinion not published in official reporters, the First Circuit reached a similar conclusion. *See Shaw v. Secretary of Health & Human Servs*., No. 93-2173, 1994 WL 251000, at *5 (1st Cir. 1994) (finding no prejudice in administrative law judge's failure to recontact treating physician in circumstances in which there was a consultative examination, the administrative law judge apparently saw no need for further evidence from the treating doctor and the claimant was well-represented and herself indicated no desire to offer additional evidence; noting, "Where the evidence is inconsistent or insufficient to enable the ALJ [to] make a decision, the ALJ may recontact medical sources, request that
(continued on next page)

in a Social Security hearing."); *Pinkham v. Barnhart*, No. 03-116-B-W, 2004 WL 413306, at *4 (D. Me. Mar. 3, 2004) (rec. dec., *aff'd* Apr. 5, 2004) (failure to accord some weight to Veterans' Administration determination of disability required remand).

The Veterans' Administration line of cases is distinguishable. The Record in this case is devoid of any detail concerning the process by which the plaintiff was adjudicated eligible for workers' compensation; however, my research reveals that a worker injured in New Hampshire may qualify for continuing workers' compensation benefits even if he or she is capable of performing other work. *See, e.g., In re Jackson*, 698 A.2d 1, 2 (N.H. 1997) ("Our test for determining eligibility for workers' compensation benefits is whether the claimant is now able to earn, in suitable work under normal employment conditions, as much as he or she earned at the time of the injury. The board erred as a matter of law in limiting its analysis to the issue of the claimant's work capacity; while relevant, the fact that the claimant may now be capable of performing some type of work is not dispositive of his claim that he remains unable to earn as much as he did prior to his injury.") (citations and internal punctuation omitted).

Thus, I find (as have other courts confronted with this issue) that evidence of eligibility for workers' compensation benefits is of little to no probative value in this context. *See, e.g., Yost v. Barnhart*, 79 Fed. Appx. 553, 556 (4th Cir. 2003) ("Yost also contends that the disability award from the West Virginia Workers' Compensation Appeals Board . . . should be considered in assessing his credibility. The standards for finding a claimant disabled under West Virginia law and under the Social Security Act are entirely different. Thus, a state award of benefits does not bind us in establishing proof of disability for DIB purposes."); *Diaz v. Chater*, 55 F.3d 300, 309 (7th Cir. 1995) ("The ALJ could conclude that the state

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the claimant undergo a consultative examination or produce additional information.").

court's presumptive determination of Mr. Diaz's entitlement to state workers' compensation is entitled to little weight because it involved an entirely different inquiry from a determination of 'disability' within the meaning of the Social Security Act."); *Coria v. Heckler*, 750 F.2d 245, 247 (3d Cir. 1984) ("The ALJ correctly noted that there are different statutory tests for disability under workers' compensation statutes and under the Social Security Act. For example, Social Security disability insurance is available only where the disability could be expected either to lead to death or last for more than twelve months, and prevents the ability to engage in any substantial gainful activity. In contrast, under [New Jersey] workers' compensation even temporary and partial disability are compensated. . . . Thus, we believe the ALJ could reasonably disregard so much of the physicians' reports as set forth their conclusions as to Coria's disability for workers' compensation purposes.") (citations omitted). To the extent the administrative law judge erred in failing even to discuss this evidence, the error accordingly was harmless.

F. Pain Determination

In his final statement of error, the plaintiff asserts that the administrative law judge failed to evaluate his subjective complaints of pain in accordance with the so-called *Avery* factors as set forth in *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19, 21 (1st Cir. 1986), and restated in 20 C.F.R. § 404.1529(c) and Social Security Ruling 96-7p. *See* Statement of Errors at 17-19. This plaint again is without merit.

Avery instructs that an adjudicator "be aware that symptoms, such as pain, can result in greater severity of impairment than may be clearly demonstrated by the objective physical manifestations of a disorder." *Avery*, 797 F.2d at 23 (citation and internal quotation marks omitted). "Thus, before a complete evaluation of this individual's RFC can be made, a full description of the individual's prior work record,

daily activities and any additional statements from the claimant, his or her treating physician or other third party relative to the alleged pain must be considered." *Id*. (citation and internal quotation marks omitted).

Ruling 96-7p, promulgated subsequent to *Avery*, describes evidence relevant to evaluation of pain and other claimed symptoms as including:

> 1. The individual's daily activities;
>
> 2. The location, duration, frequency, and intensity of the individual's pain or other symptoms;
>
> 3. Factors that precipitate and aggravate the symptoms;
>
> 4. The type, dosage, effectiveness, and side effects of any medication the individual takes or has taken to alleviate pain or other symptoms;
>
> 5. Treatment, other than medication, the individual receives or has received for relief of pain or other symptoms;
>
> 6. Any measures other than treatment the individual uses or has used to relieve pain or other symptoms (e.g., lying flat on his or her back, standing for 15 to 20 minutes every hour, or sleeping on a board); and
>
> 7. Any other factors concerning the individual's functional limitations and restrictions due to pain or other symptoms.

Social Security Ruling 96-7p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2003) ("SSR 96-7p"), at 135. After obtaining such information the administrative law judge must make a credibility finding regarding the claimed pain or other symptoms. *See, e.g., id*. at 137 ("The determination or decision must contain specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight."). On review, the supportability of this determination is assessed on the same basis as are credibility

determinations in general – *i.e.*, "entitled to deference, especially when supported by specific findings." *Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987).

The plaintiff complains, in particular, that the administrative law judge mishandled his complaints of neck pain in view of the objective evidence of the existence of a neck condition and his treating physicians' opinion that this condition alone was disabling. *See* Statement of Errors at 19. To the contrary, the administrative law judge supportably discredited the plaintiff's subjective complaints of neck pain on the basis of several *Avery* factors, including:

1. That the plaintiff himself on some occasions omitted even to mention his neck pain when re-applying for SSD benefits. *See* Record at 27, 267, 319-20.

2. That since 1995 the plaintiff had engaged in activities that were inconsistent with his complaints of disabling pain and restriction of movement, including (i) a work attempt in April and May 1996 that entailed forty hours a week of maintenance work and (ii) gardening, archery, weight lifting, light carpentry, cooking and cleaning. *See id*. at 27-28, 60, 77-78, 189, 208-09.[13]

Accordingly, I find no basis for disturbing the administrative law judge's pain/credibility assessment.

II. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for

[13] The plaintiff observes that a claimant's ability to do light housework, take short walks, shop and do other sporadic and transitory activities does not translate into an ability to perform sustained gainful employment. *See* Statement of Errors at 9; *see also, e.g., Rohrberg v. Apfel*, 26 F. Supp.2d 303, 310 (D. Mass. 1998). Be that as it may, the administrative law judge supportably found the plaintiff's activities inconsistent with his complaints of disabling pain and restriction of motion.

which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 7th day of May, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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